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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 410

ANTILLES SURVEYS, INC.,
Petitioner,

v.

PERCY DE JONGH, as Commissioner, Department of Finance,
and
VIGGO A. HENDRICKS, as Chief Tax Processing Branch, Department of Finance,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WARREN H. YOUNG
and
JOHN D. MARSH
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St. Croix, U. S. Virgin Islands

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Opinions Below

The Order of The District Court of The Virgin Islands (R. 17a-18a)[1] is not officially reported. The opinion of the court of appeals (Appendix, infra, pp. 1a-6a) is reported at 358 F. 2d 787.

1. "R" references are to the petitioner's printed appendix in the court of appeals.

Jurisdiction

The judgment of the court of appeals was dated and entered March 21, 1966 (Appendix, infra, 7a). Rehearing was denied on March 5, 1966 (Appendix, infra, 8a). Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether one against whom discrimination has been systematically practiced by territorial taxing officials in the assessment of a gross receipts tax, and who complains on ground of denial of equal protection and due process, is precluded from obtaining relief from the discriminatory assessment on the theory that the tax can and may be levied against those favored by such taxing officials.

Constitutional and Statutory Provisions Involved

The Constitutional provision involved is the Due Process clause of Amendment V, the text of which is printed in the appendix, infra, p. 9a.

The federal statute involved is section 3, The Bill of Rights of the Revised Organic Act of the Virgin Islands, sec. 3, 68 Stat. 498, 48 U.S.C. 1561, the pertinent paragraph of which provides:

> "No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law or deny to any person therein equal protection of the laws."

The territorial statute involved is Title 33 Virgin Islands Code, section 43, the pertinent portion of which provides:

> "(a) All persons engaged in business including those trading in articles, goods, merchandise or commodities shall report their gross receipts and pay a tax of two percent on the gross receipts of such business; * * *. This section shall not apply to artisans, tradesmen, or professionals, such as are commonly understood to include doctors, lawyers, engineers, plumbers, electricians, barbers, etc., selling their skills or services on an individual and personal basis and producers within the Virgin Islands of livestock and agricultural products; * * *."

The statute is set forth in full in the appendix, infra, p. 9a.

Statement

Petitioner, plaintiff below, is a Virgin Islands corporation engaged in the engineering and real estate brokerage businesses. Respondents are tax officials of the Virgin Islands government.

Respondents have assessed taxes against petitioner for the years 1960 through 1963 for gross receipts derived by petitioner from its businesses. No such taxes have been assessed against individuals engaged in identical pursuits, even though receipts are derived from services rendered by servants, agents and employees of such individuals.[2]

As established by the pleadings, especially defendants' answer admitting allegations of paragraph eight of the complaint (R. 6a, 9a) and the requests for admissions, that respondents interpret the exemption clause of the statute as extending only to individuals and not to corporations. For this reason the tax has been assessed against petitioner while individuals have not been assessed even

2. See Plaintiff's Request for Admissions, especially paragraphs numbered 6 and 8 (R. 12a-14a) and the unverified answer thereto (R. 15a-16a).

though the types of businesses and manner of operation are identical. The sole basis for the distinction is the fact that petitioner is incorporated.

On motions of both parties for summary judgment (R. 15a, 16a) the District Court of the Virgin Islands denied that of petitioner and granted that of respondents, holding that "The plaintiff corporation is subject to the gross receipts tax on the basis that plaintiff was not selling its skills or services on an individual basis within the meaning of 33 Virgin Islands Code 43(a)" (R. 17a, 18a).

In affirming, the court of appeals determined that the gross receipts law is valid if so construed as to limit the exemption provision "to receipts attributable solely to the taxpayers own personal services," which construction it adopted. Under such construction, petitioners were held not to be entitled to the exemption and relief was denied (Appendix, infra, p. 6a).

On petition for rehearing it was pointed out that it was not the validity of the statute which was questioned but the application of the law by the Government taxing officials under their interpretation, which resulted in discrimination against corporations in favor of individuals engaged in identical businesses and whose receipts are derived through the services of employees.

In denial of the petition for rehearing, it was held that the interpretation placed on the statute by respondents is immaterial and that, "Even as to the past, discrimination against petitioner may now be rectified by deficiency assessments on its competitors who were improperly overlooked."

If this should fail to occur, it is said, since the action is not one to compel collection from petitioner's competitors but to escape the assessment petitioner is not entitled to relief.

Reasons for Granting Writ

The court of appeals' decision in the instant case is in direct conflict with the heretofore uniform rule that a taxpayer against whom intentional, systematic discrimination is practiced by taxing authorities is deprived of the constitutional right of equal protection and is entitled to relief from the unequal assessment.

This rule is found in *Cumberland Coal Co.* v. *Board of Revision, Etc.,* 284 U. S. 23, 28.

Also, in *Iowa-Des Moines Nat. Bank* v. *Bennett,* 284 U. S. 239, it was held, p. 244, that discrimination is wrongful even though the exaction is made by taxing officers without authority under state law, and p. 245, that such action by taxing officers was the act of the state as respects denial of equal protection.

It was also held, p. 247, that the fact that the state had power to equalize taxation between the complaining bank and competing capital by compelling payment of the unpaid balance of the amounts theretofore assessed was not material as respects the validity of the tax. The petitioners' rights were violated, and the cause of action arose, when taxes at the lower rate were collected from their competitors.

It was further held, p. 247, that the taxpayer subjected to discriminatory taxation through the favoring of others in violation of federal law cannot be required to assume the burden of seeking an increase of taxes which others should have paid.

Attention is invited to *Raymond* v. *Chicago Union T. Co.,* 207 U. S. 20, 38 and to *Concordia Fire Ins. Co.* v. *People,* 292 U. S. 535, 545 for decisions of similar effect.

Hillsborough T. P. v. *Cromwell,* 326 U. S. 620, 623, holds that the constitutional requirement of equal protection is

not satisfied if a state does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of taxes of other members of the class.

The questioned decision is also in conflict with decisions of courts of the eighth and District of Columbia Circuits.

Knowles v. *First Nat. Bank of Shenandoah* (C.C.A. 8, 1932), 58 F. 2d 232, 233, affirmed a judgment of the district court enjoining collection of a tax assessment where discrimination had been practiced by taxing officials against plaintiff.

The decision in *Hamilton Nat. Bank* v. *District of Columbia* (C.A., D.C. 1946), 156 F. 2d 843, 846, 847, where relief was afforded a bank against which discrimination had been practiced by tax assessors, is of especial interest in the case at bar since there, as in the instant case, the protection of the Fourteenth Amendment did not apply.

The decision of the court of appeals, if allowed to stand, will not only tend to confuse a question long considered settled, but will deny to the people of the Virgin Islands the right to equal treatment by their taxing officials, which right is secured to the people of the several states.

CONCLUSION

For the reasons stated, it is respectfully urged that this petition for a writ of certiorari be granted.

Respectfully submitted,

WARREN H. YOUNG
JOHN D. MARSH

APPENDIX

Opinion of the Court of Appeals

ANTILLES SURVEYS, INC.,

Appellant,

v.

PERCY DE JONGH, as Commissioner, Department of Finance, and Viggo A, Hendricks, as Chief Tax Processing Branch, Department of Finance.

No. 15583.

United States Court of Appeals
Third Circuit.

Argued at Charlotte Amalie
Feb. 3, 1966.

Decided March 21, 1966.

Rehearing Denied May 5, 1966.

Action to enjoin collection of Virgin Islands gross receipts tax. The District Court of the Virgin Islands, Division of St. Croix, Christiansted Jurisdiction, Walter A. Gordon, J., denied relief, and plaintiff appealed. The Court of Appeals, Aldrich, Circuit Judge, held that Virgin Islands Organic Act prohibiting legislation violating due process or denying equal protection did not prohibit gross receipts statute with exemption limited to receipts attributable solely to taxpayer's own personal services, so that corporation engaged in engineering and real estate

brokerage was subject to tax although individuals engaged in those businesses would be exempt.

Affirmed.

John D. Marsh, Christiansted, St. Croix, V. I. (Young, Isherwood and Marsh, Christiansted, St. Croix, V. I., on the brief) for appellant.

David Kelso McConnell, Asst. Atty. Gen., Charlotte Amalie, St. Thomas, V. I. (Francisco Corneiro, Atty. Gen. of Virgin Islands, Charlotte Amalie, St. Thomas, V. I., on the brief), for appellee.

Before KALODNER, Chief Judge, and MARIS and ALDRICH,* Circuit Judges.

ALDRICH, Circuit Judge.

This is an action to enjoin the collection of a gross receipts tax assertedly imposed by act of the Virgin Islands legislature. Taxpayer is a Virgin Islands corporation engaged in two businesses, engineering and real estate brokerage. Certain facts appearing by admissions in the pleadings, or by uncontradicted affidavits, both parties moved for summary judgment. The court granted the government's motion, and taxpayer appeals.

The statute reads, "All persons engaged in business including those trading in articles, goods, merchandise or commodities shall report their gross receipts and pay a tax of two percent on the gross receipts of such business; * * *." 33 V.I.C. ¶ 43(a). A subsequent sentence provided, at the time of suit, "This section shall not apply to artisans, tradesmen, or professionals, such as

* Setting by designation.

are commonly understood to include doctors, lawyers, engineers, barbers, etc.,[1] selling their skills or services on an individual basis and producers within the Virgin Islands of livestock and agricultural products; * * *."

(1) Thus, individuals who receive payments for engineering services are in terms exempt from tax. The government does not dispute that individual real estate brokers fall also within the exemption. By the same token, the government cannot claim that the exemptions are limited to true professionals, such as doctors and lawyers, who perform services that could not be rendered by corporations.

Taxpayer's claim that it comes within the provisions of the exemption requires no comment. The exemption does not encompass all engineers, brokers, etc., but only those "selling their skills or services on an individual and personal basis." Whatever that may mean, the exemption does not apply to corporations engaged in such activities.

(2) The only real question we see is whether the legislature was precluded from enacting the statute in this form by section 3 of the Revised Organic Act of the Virgin Islands, or, more exactly, whether taxpayer may successfully make such claim.[2] This section provides,

> "No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or

1. This sentence has since been amended by adding "fishermen," "plumbers," and "electricians." V.I. Laws 1965, No. 1368, § 1; V.I. Laws 1965, No. 1461, § 1.

2. It is, of course, axiomatic that only persons who can show injury are in a position to attack the constitutionality of a statute. Cf. Morf *v.* Bingaman, 1936, 298 U. S. 407, 413, 56 S. Ct. 756, 80 L.Ed. 1245.

property without due process of law or deny to any person therein equal protection of the laws." 48 U.S.C. § 1561.

Taxpayer's contention is that it is improper to tax it for receipts from services that would result in no tax upon unincorporated competitors engaged in precisely the same line of work. For this it cites Quaker City Cab Co. v. Com. of Pennsylvania, 1928, 277 U.S. 389, 48 S.Ct. 553, 72 L.Ed. 927. The government denies that the sole distinction made by the act is that taxpayer is incorporated and its competitors are not. Parenthetically, its insistence that the act does reach individuals engaged in unexempted businesses precludes a claim that whatever vigor may be left in Flint v. Stone Tracy Co., 1911, 220 U.S. 107, 31 S.Ct. 342, 55 L.Ed. 389, after *Quaker City Cab,* might uphold the act as essentially a corporate franchise tax. At the same time, what differences the government does assert between those taxed and those exempt is far from clear.[3]

(3, 4) The basic question is, is there a reasonable classification. While the mere fact of incorporation and nonincorporation of two otherwise completely comparable businesses may be thought an arbitrary and impermissible criterion of classification when dealing with only a small number of multitude of businesses which may be carried on in both corporate and noncorporate forms, differences

3. Under Rule 36 taxpayer requested the government to admit that it made no attempt to tax individuals and partnerships engaged in the real estate brokerage on gross receipts "earned through the agency of agents, servants, employees or salesmen." We construe the government's answer as an attempted denial. The denial was clearly defective. We need not, however, pursue this matter.

in size may be significant and sufficient. Carmichael v. Southern Coal & Coke Co., 1937, 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245; State Board of Tax Commissioners of Indiana v. Jackson, 1931, 283 U.S. 527, 51 S.Ct. 540, 75 L.Ed. 1248. Also, taxpayers may be treated differently depending upon whether they are self-employed or employed by others. Walters v. City of St. Louis, 1954, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660. Combining these two examples we could readily conclude that it would be appropriate to tax persons, whether corporate or individual, who rendered services through employees, and not tax persons whose receipts were based upon their own personal labors. White Cleaners & Dyers v. Hughes, D.C.La., 1934, 7 F.Supp. 1017 (semble). Indeed, in the case at bar, if only individual engineers and brokers who have no engineers or brokers working for them are exempted from the tax, and individuals who do employ such persons are not exempt to the extent that they enjoy receipts from the labor of others, we believe taxpayer could have no legitimate complaint. If the converse were so, on the facts presently of the record we could not distinguish this case from *Quaker City Cab Co.*, supra.

(5, 6) Since it is our duty, where possible, to give a statute a meaning that would support it, rather than invalidate it, Lynch v. Overholser, 1962, 369 U.S. 705, 82 S.Ct. 1063, 8 L.Ed.2d 211; United States v. Witkovich, 1957, 353 U.S. 194, 77 S.Ct. 779, 1 L.Ed.2d 765, and since that can readily be done in this case by construing the exemption provision as limited to receipts attributable solely to the taxpayer's own personal services as above

defined, we adopt that construction. It follows that there is no basis for granting the injunction, and the judgment of the district court will be affirmed.

Before MARIS, KALODNER, and ALDRICH,* Circuit Judges.

ON PETITION FOR REHEARING

ALDRICH, Circuit Judge.

Appellant, by petition for rehearing, seeks to show that the government taxing authorities have construed and applied the act differently from this court's interpretation. The petition must be denied, as the assertion, if true, is of no present moment. Legally, the statute means what we, not what the taxing authorities, determine.

So far as de facto, as distinguished from de jure discrimination is concerned, if the taxing authorities have misunderstood the act in the past, we cannot assume that they will continue to misapply it. Even as to the past, discrimination against petitioner may now be rectified by deficiency assessments on its competitors who were improperly overlooked. However, if for some reason this should fail to occur, the thrust of the complaint was not to compel collection from appellant's competitors, but to declare the statute void and permit appellant to escape assessment itself. It should be obvious that it is not entitled to such relief.

The petition for rehearing will be denied.

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* Sitting by designation.

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

[SAME TITLE]

APPEAL FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS, DIVISION OF ST. CROIX, CHRISTIANSTED JURISDICTION.

Present: KALODNER, Chief Judge, and MARIS and ALDRICH, Circuit Judges.

This cause came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Croix, Christiansted Jurisdiction, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of July 8, 1965 of the said District Court be, and it is hereby affirmed, with costs.

ATTEST:

IDA O. CRESKOFF
Clerk

March 21, 1966

Costs taxed in favor of appellees as follows:

Brief for appellees $126.50

Certified as a true copy and issued in lieu of a formal mandate on June 7, 1966.

Test: IDA O. CRESKOFF
Clerk, United States Court of Appeals for the Third Circuit.

Sur Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

[SAME TITLE]

Present: STALEY, Chief Judge and MARIS, McLAUGHLIN, KALODNER, HASTIE, ALDRICH, GANEY, SMITH and FREEDMAN, Circuit Judges.

The petition filed for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
ALBERT B. MARIS
Circuit Judge

Dated: May 5, 1966

Amendment V to the Constitution of the United States of America

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 33, Virgin Islands Code, Section 43

Rate and base of gross receipts tax; exemption; definition

(a) All persons engaged in business including those trading in articles, goods, merchandise or commodities shall report their gross receipts and pay a tax of two percent on the gross receipts of such business; Provided, however, That the rate of tax on foodstuffs and on building contractors shall be one percent. The proceeds of gross receipts tax shall be covered into the General Fund of the Treasury of the Virgin Islands. This section shall not apply to artisans, fishermen, tradesmen, or professionals, such as are commonly understood to include doctors, lawyers, engineers, plumbers, electricians, barbers, etc., selling their skills or services on an individual and personal basis and producers within the Virgin Islands of livestock and agricultural products; Provided, That all persons engaged in business whose gross receipts

are less than $300 in any one month shall be exempt from the payment of the gross receipts tax for that month; Provided further, however, That if the gross receipts for any other month are $300 or more, the tax levied by this section shall be paid on the total gross receipts for such month.

(b) The term "gross receipts" as used in this title shall mean all receipts, cash or accrued, of the taxpayer for services or derived from trade, business, commerce or sales, and the value accruing from the sale of tangible personal property or services, or both, including rentals, fees and other involvements, however designated, without any deduction on account of the cost of the property sold, the cost of materials used, labor cost, royalties, taxes, interest or discount paid, or any other expenses whatsoever.

(c) The provisions of this section shall apply to contractors with the Government of the Virgin Islands for public works, projects or undertakings.

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SEP 16 1966
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and

VIGGO A. HENDRICKS, AS CHIEF TAX PROCESSING BRANCH, DEPARTMENT OF FINANCE,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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DAVID KELSO MCCONNELL
Assistant Attorney General

Of Counsel

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Decisions of the Courts Below

The Order of the District Court of the Virgin Islands (R. 17a)* is not officially reported. The opinion of the Court of Appeals is reported at 358 F.2d 787.

Questions Presented

1. Should certiorari be granted when the relief requested cannot be granted because petitioner's acts have rendered the question moot?

* This and similar references are to petitioner's Appendix in the Court of Appeals which has been filed with this Court.

2. Should certiorari be granted to review dictum?

3. Should certiorari be granted to review a question based upon an assertion of facts not specifically found to exist by the Courts below?

4. Should certiorari be granted to review a decision denying an injunction against the collection of gross receipts taxes: where the statute was not challenged; where the Court found the petitioner liable for the taxes; and where the Court construed the statute in a manner so that the tax burden would be equally distributed?

Statement

Petitioner, plaintiff below, brought on action styled "Action for Declaratory Relief and Injunction" against those officials responsible for collecting the Gross Receipts Tax of the Virgin Islands—33 V.I.C. Sec. 43. The thrust of plaintiff's complaint (R. 5a-7a) and prayer for relief was to enjoin the collection of the gross receipts taxes due from petitioner for the years 1960-1963 inclusive. Plaintiff did not allege payment of the tax nor in its prayer for relief did it request a refund.

Respondents alleged in their answer as an affirmative defense that plaintiff had not paid its gross receipts taxes. (R. 9a) There was no denial of that allegation.

Petitioner moved for judgment on the Pleadings (R. 11a) requesting the Court to grant the relief prayed in the complaint. Subsequently, both parties moved for summary judgment. (R. 15a, 16a)

Respondents' Motion was granted. (R. 17a) Petitioner appealed. The United States Court of Appeals for the Third Circuit affirmed the Order of the District Court and denied petitioner's Petition for a Rehearing.

After the decision of the Court of Appeals was rendered, inquiry was made concerning the amount of gross receipts taxes owed by Antilles Surveys, Inc. It was discovered at that time that Antilles Surveys, Inc., had paid its gross receipts taxes plus interest for the years 1960-1963 three days prior to the filing of the Answer herein and that the penalties due on those taxes were paid the following October after the appeal had been taken. See Affidavit of Viggo A. Hendricks in Appendix p. 1a.

REASONS FOR DENYING WRIT

I.

There is no longer any controversy.

No injunction can issue against the respondents to restrain the collection of gross receipts taxes levied against petitioner for the years 1960-1963 inclusive because petitioner has paid the taxes in question. Since the relief requested by petitioner was an injunction, that question is now moot.

II.

The question presented by petitioner is a hypothetical question.

Petitioner has framed its question as if the lower courts had found that systematic discrimination was